Supreme Court of the United States.

No. 234.

HOLYOKE WATER POWER CO.,

PLAINTIFFS IN ERROR,

vs.

THEODORE LYMAN ET AL.,

Commissioners on Inland Fisheries of the Commonwealth of Massachusetts.

BRIEF FOR THE DEFENDANTS IN ERROR.

BOSTON:
PRESS OF ROCKWELL & CHURCHILL.
122 WASHINGTON STREET.
1872.

Supreme Court of the United States.

THE HOLYOKE WATER POWER COMPANY, PLAINTIFFS IN ERROR,

vs.

THEODORE LYMAN ET AL., COMMISSIONERS ON INLAND FISHERIES OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANTS IN ERROR.

The plaintiffs in error, under their charter granted by Massachusetts, St. 1859, Chap. 6, are the owners of a dam across the Connecticut river, at Holyoke, in the county of Hampshire, and the locks and canals connected therewith, which were erected by the Hadley Falls Company, under the provisions of its charter. St. 1848, Chap. 222.

The defendants in error, as Commissioners on Inland Fisheries, of Massachusetts, by virtue of the authority conferred on them by the Sts. of 1866, Chap. 238; 1867, Chap. 344; and 1869, Chap. 384, § 2, and after the proper proceedings preliminary thereto, filed their bill in equity, to compel the plaintiffs in error to construct a fish-

way, suitable and sufficient to secure the passage of salmon and shad up the river, and over said dam, in their accustomed seasons.

The plaintiffs in error claim that the statutes of Massachusetts, under which they are required to construct this fishway, are void, because they impair the obligation of the contract contained in the charter of the Hadley Falls Company, whose successors they are, and whose rights they possess, and so are in violation of Article 1, § 10, of the Constitution of the United States, which prohibits the States from passing any law impairing the obligation of contracts.

I.

a. The Connecticut river at the plaintiff's dam is not a navigable stream, and any proprietor of the soil, under, and on each side thereof, might erect and maintain a water mill, and a dam to raise water for working it, across said stream, without legislative aid.

R. S. of Mass., Chap. 116; Gen. Stat. of Mass., Chap. 149.

b. By the law of Massachusetts it is the duty of those who maintain dams to provide and maintain suitable fishways therein.

c. Every owner of a dam holds it on condition, or perhaps under the limitation, that a reasonable and sufficient passage-way shall be allowed for the fish. This limitation being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it.

Stoughton *vs.* Baker, 4 Mass., 528.

In that case, there was a neglect to build a fishway from 1634 to 1789; but it was held that the duty of the owner to maintain a fishway continued.

See also Commonwealth *vs.* Chapin, 5 Pick., 199.
Vinton *vs.* Welch, 9 Pick., 87.
Commonwealth *vs.* Essex Co., 13 Gray, 248.

d. It being a public right that such fishways shall be maintained, it is within the power and duty of the Legislature to prescribe the manner in which such fishways shall be maintained. This power the Legislature of Massachusetts has constantly exercised; requiring the owners of dams already existing, in numerous instances, to build such fishways at their own expense, subject to the approval of committees appointed by the Legislature, or the selectmen of towns, and by authorizing and directing committees appointed by the Legislature, or to be chosen by towns, to go on and construct such fishways.

See Sts. 1780, c. 16, passed Feb. 19, 1781.
1786, c. 7, passed June 27, 1786.
1787, c. 10, § 2, passed July 4, 1787.
1787, c. 33, § 1, passed March 1, 1788.
1787, c. 35, § 2, passed March 10, 1788.
1787, c. 58, §§ 1, 2, passed March 28, 1788.
1789, c. 5, passed June 15, 1789.
1789, c. 8, § 2, passed June 20, 1789.
1789, c. 43, § 4, passed Feb. 27, 1790.
1789, c. 51, § 3, passed March 4, 1790.
1790, c. 8, § 1, passed June 19, 1790.
1791, c. 30, §§ 1, 2, passed Feb. 22, 1792.
1791, c. 55, § 4, passed March 9, 1792.
1796, c. 83, passed March 10, 1797.
1797, c. 69, § 5, passed March 1, 1798.
1797, c. 70, § 1, passed March 1, 1798.
1797, c. 74, § 1, passed March 2, 1798.
1798, c. 29, § 5, passed June 28, 1798.
1798, c. 78, passed March 1, 1799.
1798, c. 83, § 3, passed March 1, 1799.
1799, c. 68, passed March 1, 1800.

1799, c. 76, passed March 4, 1800.
1800, c. 67, passed March 1, 1810.
1801, c. 59, § 2, passed March 3, 1802.
1801, c. 66, § 5, passed March 6, 1802.
1802, c. 57, § 2, passed Feb. 9, 1803.
1802, c. 63, § 32, passed Feb. 12, 1803.
1802, c. 71, § 4, passed Feb. 16, 1803.
1803, c. 107, § 4, passed March 3, 1804.
1803, c. 152, § 5, passed March 9, 1804.
1804, c. 134, § 1, passed March 16, 1805.
1805, c. 76; 1806, cc. 28, 117.
1808, c. 91, § 8; 1812, c. 106; 1829, c. 55.
1839, c. 134; 1843, c. 20; 1845, c. 79.

The foregoing are but a few of the statutes on this subject with which the legislation of Massachusetts abounds, and they are cited to show the great importance the Legislature has attached to the preservation of the river fisheries, by means of fishways, and the frequent exercise of the right of legislative control, prior to the incorporation of the Hadley Halls Company.

See Appendix to the 6th Annual Report of the Commissioners on Inland Fisheries of Massachusetts for the year ending Jan. 1, 1872, where these statutes are collected.

e. It has likewise long been the established law of Massachusetts, that a grant of authority by the Legislature, to erect a dam across a river, is to be construed to be under an implied condition to keep an open fishway, unless there is some express provision to the contrary.

Stoughton *vs.* Baker, 4 Mass., 528.
Vinton *vs.* Welsh, 9 Pick., 87.
Commonwealth *vs.* Essex Co., 13 Gray, 248, 249.

f. By statute of 1830, c. 81, reenacted in the Revised Statutes, c. 44, § 23, and the Gen. Statutes, c. 68, § 41, the Legislature of Massachusetts had declared that every act of incorporation, passed after the 11th day of March, 1831, should "at all times be subject to amendment, alteration or repeal, at the pleasure of the Legislature."

This statute has been a part of all charters since granted, just as much as if it had been inserted in the charters themselves.

Penn. College cases - 13 Wallace 213 -

II.

It must be assumed therefore, that the plaintiffs in error are bound to maintain a fishway in their dam, unless it can be shown that by the provision of the charter of the Hadley Falls Co. they are exempted from that duty.

a. There is no express provision in the charter, exempting the Hadley Falls Company from that duty.

b. There is no provision from which such an exemption can be implied, unless it is found in the provision concerning the payment of damages which might arise to fishing rights above the dam.

c. These provisions are as follows: St. 1848, c. 222, § 4: "Said corporation shall pay such damages to the owners of the present fishing rights, existing above the dam which the said company is hereby empowered to construct, as may be awarded," etc., etc.

§ 5. "The Hadley Falls Company, or any of the owners of said fishing rights, may at any time apply to said county commissioners, to proceed and ascertain the damages to said fishing rights; . . . . . and the said commissioners shall determine and award the damages to said fishing rights within sixty days," etc.

d. It is to be observed that the Hadley Falls Co. by their charter acquired no right to exercise the power of eminent domain. Their

rights and liabilities were left to be determined by the mill acts before referred to.

Revised Statutes of Mass., c. 116.

e. But there is no provision in the mill acts for the assessment of damages to fishing rights, and by § 30 of said chapter it is provided that "no action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using any mill or mill-dam, except as is provided in this chapter."

f. The Legislature might well have supposed that a dam across the Connecticut at that point, provided with the best fishway then known, might injure, more or less, the fishing rights above the dam, and so inserted this provision in the charter, to supply an omission in the general law. And but for this supposed necessity the charter would have been as silent on the subject of damages to fishing rights *as it is in relation to damages by flowing.*

g. It is no answer to this argument to say that the Legislature made no provision in the charter for damages to the fishing rights below the dam.

The Legislature may not have known, and undoubtedly did not consider, whether any injury would accrue, by the erection of the dam, to the fishing rights below it. And it was entirely within the power and province of the Legislature to protect those rights, when it became manifest that those rights were affected.

h. What I claim is, that the Hadley Falls Company acquired no rights under their charter in relation to their dam, and stood in no different relation to the public than any owner of the soil, who erects and maintains a dam under the general laws of the State; and that they erected their dam, subject to the same general duty, condition, or limitation to which all other owners of dams in the State were, and are, subject.

III.

The language of the charter does not imply that they were to be relieved from the duty of building and maintaining a fishway.

There are certain general considerations which will aid in construing the charter.

a. The preservation of the fisheries is for the benefit of the public. The right to have the fish pass up the river is a public right. It is true that the right to catch the fish is in the owners of the soil; but the right to have the fish there so that they can be caught is a public right.

See Commonwealth *vs.* Essex Co., 13 Gray, 247.

b. All grants of the Legislature surrendering public rights are to be construed strictly against the grantees. The grantees will take no powers by implication which are not necessary for carrying the purposes of their charter into effect.

"The grant of privileges and exemptions to a corporation is strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms."

Ohio Life Ins. Co. *vs.* Debolt, 16 How., 435. See also Mills *vs.* St. Clair Co., 8 How., 581.

"Any ambiguity in the terms of the contract [charter] must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act."

Stourbridge Canal Co. *vs.* Wheeley, 2 B. & Ad., 793; cited and approved in Charles River Bridge *vs.* Warren Bridge, 11 Pet., 544.

"All grants of privileges are to be liberally construed in favor of the public, and, as against the grantees of the monopoly, franchise or charter, to be strictly interpreted. Whatever is not unequivocally granted in such acts is taken to have been withheld; all acts of incorporation, and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies."

Sedgw. on St. and Const. Law, 338, 339, and seq., and cases cited.

"In all grants from the government to the subject, the terms of the grant are to be taken most strictly against the grantee and in favor of the grantor, — reversing the common rule as between individuals, — on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant prepared by him, and submitted to the government for its allowance."

Commonwealth *vs.* Roxbury, 9 Gray, 492.

For example: an authority to fill up land and construct a wharf does not extinguish a highway.

People *vs.* Lambier, 5 Denio, 1.

IV.

The language of the charter upon which the defendants rely by no means implies that the damages therein provided were to be paid for the destruction of the fisheries above. The building of the dam, even with a fishway, would necessarily cause great injury to the fisheries, and this injury would be a proper subject of compensation.

It was known in 1848, when this charter was granted, that no fishway would leave the fisheries above such a dam unimpaired. This had been ascertained and brought to the attention of the Legislature by the experience of the Essex Company.

If it had been expressly provided in the charter of the Hadley Falls Co. that they should build a fishway, it would still have been necessary to have the same provision which now exists, or one substantially similar, for compensation to the owners of the fishing rights above the dam for the injury done to them.

The provision for compensation is, to say the least, just as consistent with the idea that there should be a fishway, as that there should not be one. How, then, can it be contended that it implies authority to build the dam without a fishway?

The language of the charter contemplates a partial injury to the fishing rights, rather than their total destruction. If it had been intended to provide compensation for their destruction, it would have been more natural to say that the county commissioners should ascertain "*the value* of said fishing rights," rather than "the damages *to* said fishing rights;" and that they should award *such value*, rather than the damages *to* them.

There is every presumption that the Legislature would not intend to allow the total destruction of the fisheries, when they might be partially preserved by a fishway.

No dams in Massachusetts, so far as known, had been allowed to be built without fishways. The universal rule, it is believed, was the other way. Simply omitting to provide for a fishway in terms, raises no presumption that none was intended, because the well

known law, constantly practised on, was that fishways could be expressly ordered afterwards if the owners of the dam should neglect their duty. What reason is there to suppose that this dam alone, of all the dams in the Commonwealth, was to have no fishway?

A taking under the right of eminent domain must be limited to the necessity. No greater rights can be taken than are required. So, in construing a grant, the authority will be deemed to have been limited to the necessity.

The exigencies and requirements of the corporation did not require a dam without a fishway. The report of the case expressly finds that the fishway would not diminish their water power; unless, indeed, they should wish to add to the permanent height of their dam by flash-boards. There is nothing to show that they have any right to add such flash-boards at any time. The charter, § 3, gives them the right to build a dam *of a certain height*. In the absence of any express finding to the contrary, it may be presumed that their present dam is as high as they have a right to make it. There is certainly no presumption to the contrary.

The damages which they have paid must be presumed to have been estimated for the injury done by the dam with a fishway in it. It must have been assumed that they would do their duty. It was their duty to build a fishway; and the tribunals had a right to assume that they would do it. If, by their delay, it has happened [and there can be no means of ascertaining that the fact is so] that they have been compelled to pay more damages than would have been awarded in case of a prompt compliance on their part with their duty, this is of no legal significance. The tribunals may possibly have had a prophetic doubt as to the disposition of the company to do their duty. Legally, it is to be presumed that the damages were assessed upon the right basis. The plaintiffs in error cannot be heard to say that they have paid too much damages.

V.

The fisheries below the dam are also injured by the construction of a dam without a fishway. No compensation being provided for this injury, the charter was to this extent unconstitutional. A grant of a right to take private property under the right of eminent domain must make provision for compensation, or else it is void.

Boston & Lowell Railroad *vs.* Salem & Lowell Railroad, 2 Gray, 37.

If, therefore, the true construction of this charter is, that it authorized a close dam, without a fishway, the charter was unconstitutional, so far as the exemption from the liability to make a fishway is concerned, because it injured the fishing rights below the dam without providing compensation.

It is no answer to say that with a fishway the dam would still have injured the fisheries below. That fact does not appear; and on the report cannot be assumed to exist. It may well be that the fishway would have rendered any injury to the fisheries below wholly unappreciable.

Nor is it any answer to say that it does not appear that the owners of those fishing rights have ever claimed that they were damaged. It does not appear that they have not so claimed; nor is it the duty of the commissioners, or of the Commonwealth, to ascertain and prove how the fact is.

If the Commonwealth finds that a grant of a charter is used otherwise than according to the intention, and that larger privileges are assumed and exercised than the charter warrants, or that a charter by inadvertence is made to confer unconstitutional powers, it may and ought to interfere and recall the corporation to its duty under the constitution and laws, whether anybody is injured by the unwarranted assumption of authority or not.

A fortiori, when not only the private rights of citizens, but the public rights are infringed.

The Commonwealth does not stand in the position of a stranger who cannot question the extent of authority exercised.

The fact that the fisheries below are injured by the construction of a dam without a fishway, and that no compensation was provided for such injury, is an additional argument to show that the true construction of the charter did not authorize such a dam.

If the Connecticut River were entirely within the territory of Massachusetts a due regard for the rights of her own citizens would prevent the Legislature from granting leave to close up the river entirely unless this were required by an overpowering necessity, nor then, except upon compensation made to the parties injured thereby.

It may well be doubted whether a State has the power to permit a river flowing in four States, and in which the citizens of those States have similar rights, to be effectually closed.

It would require a very strong case to carry with it a presumption that the Legislature of Massachusetts intended absolutely to close the Connecticut River against the passage of fish; not only the public right of her own citizens but the comity due to the people of Connecticut, Vermont, and New Hampshire, would prevent this, unless in the presence of an overpowering necessity.

In this case, no such necessity existed. It was not essential to the purposes for which the charter of the Hadley Falls Company was granted. Those purposes can be just as well subserved with the existence of a fishway.

Why, then, should the language of the charter be construed to give them a greater privilege than the language naturally implies or their necessities require?

CHARLES R. TRAIN,
Attorney General of Massachusetts.